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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(El Dorado)

THE PEOPLE,

Plaintiff and Respondent,

v.

HOWARD MARTIN HARMLESS,

Defendant and Appellant.

C066882

(Super. Ct. No.
P09CRF0448)

A jury convicted defendant Howard Martin Harmless of furnishing marijuana to a minor under 14 years of age (Health & Saf. Code, § 11361, subd. (a)), furnishing marijuana to a minor 14 or older (*id.*, subd. (b)), and nine counts of lewd acts on a child (Pen. Code, § 288, subd. (a)). Defendant admitted he had five prior convictions for child molestation that qualified as strikes. (Pen. Code, § 667, subds. (b)-(i).) The trial court sentenced him to 725 years to life in state prison. The court imposed restitution and various fines and fees, including \$270,000 to the victim for prospective non-economic damages.

On appeal, defendant's main contention--and the only one for which he provides any citations to authority--is that the trial court erred in admitting evidence of his prior acts of child molestation under Evidence Code section 1108 (section 1108) because they were not sufficiently similar to the charged crimes.

As we explain, we see no error in the admission of the prior acts evidence. We find defendant's remaining contentions to be insufficiently presented, to the degree that we decline to reach them. Accordingly, we shall affirm.

FACTS

Offense Conduct

In November of 2008, 13-year-old John Doe and his mother moved to Pollock Pines. They met defendant who was a neighbor in the sparsely populated area. Defendant took an interest in Doe and spent time with him. Doe felt close to defendant and told him about his troubled past.¹ When Doe fought with his mother, defendant would take his side. Defendant paid Doe to do work for him. Defendant gave him money and bought him gifts, including cigarettes and cigars. Defendant also let Doe drive his car.

One weekend, Doe had a friend, D.T., over. Defendant suggested the boys stay with him overnight and they did.

¹ Doe had been in trouble for sexual misconduct, assault and battery and petty theft. He had been in fights and had some gang involvement.

Defendant used a slang sexual term that meant he wanted to "make love" with them.² D.T. got very uncomfortable and backed up. Defendant then brought out marijuana and gave it to the boys. Both boys described defendant's smoking pipe, a "one-hitter." The police later found the pipe in a bag of charcoal during a search of defendant's property. According to D.T., after that weekend, Doe became distant, would not talk, and lost friends.

About a week later, Doe was at defendant's computer and defendant told him to lie down on defendant's bed. Defendant pulled down Doe's pants and licked his stomach. Defendant sucked Doe's penis and then gave Doe \$50 and told him he could go home.

It happened again a few days later. When Doe tried to get up, defendant bit his penis. Defendant continued to orally copulate Doe. Defendant licked his lips and told Doe he tasted like strawberry. Again, defendant gave Doe \$50. Doe's penis hurt and bled from the bite. Doe told his mother he had injured himself and she took him to a doctor where he got some cream.

The abuse continued. Defendant put his hand on Doe's penis five times. Doe stroked defendant's penis twice. Defendant sometimes wanted Doe to make moaning noises and say certain things. Once, defendant tried to "stick his thing in [Doe's]

² We glean from the record that the actual term used was "feck," which the People's evidence at trial characterized as "British slang for the word fuck," but actually is of Irish origin.

ass." It hurt and Doe bled. Doe told his mother that he was bleeding, but not the cause.

Defendant told Doe not to tell or bad things would happen. Doe would end up in foster care and his father would not take care of him. Defendant told Doe that no one would believe him. Doe, who gave his mother some of the money from defendant, did not tell anyone about the abuse because he thought it would split up the family.

Uncharged Acts

In the last incident, defendant wanted Doe to orally copulate him. Doe began but started to gag and throw up. Doe tore up the \$50 defendant had given him. He told defendant, "I'm not doing this crap anymore." Doe finally told his mother.

Three men, in their late 20's at the time of trial, testified defendant had molested them when they were children in Indiana. S.H. testified defendant was a family friend who lived with them for awhile. While watching a movie, defendant rubbed his stomach and tried to put his hands down S.H.'s pants. Over time, defendant touched S.H. and told S.H. to touch him; defendant put his mouth on S.H. and had S.H. orally copulate him. The abuse went on for over a year. Defendant told S.H. not to tell and reminded him of gifts defendant had given him. S.H. told his mother about the abuse the weekend of his tenth birthday.

T.G. testified defendant was a family friend. Beginning when T.G. was seven, defendant sexually abused him. The abuse consisted of fondling, directing T.G. to touch defendant

sexually, oral copulation, and once defendant inserted his fingers in T.G.'s anus. Defendant gave T.G. gifts and told him it was their secret. The abuse ended when other children came forward.

Defendant was also a friend of S.D.'s family; he was in a band with S.D.'s father. Starting when S.D. was five, defendant would touch S.D.'s penis and put it in his mouth and coax S.D. to do the same to him. Defendant told S.D. that if he told, his parents would be angry and S.D. would not see them again.

Defendant admitted he had molested these three boys, as well as his own son and others. In 1991, he pled guilty and served seven and a half years in prison. However, defendant denied he had ever improperly touched Doe and claimed he was rehabilitated through counseling. He claimed that once Doe found out defendant was a registered sex offender, Doe blackmailed defendant to get what he wanted by threatening to tell his mother that defendant had touched him. Doe told defendant, "I've got your life in the palm of my hand."

A business associate, defendant's daughter, and his former girlfriend testified as character witnesses for defendant. They testified defendant had "outstanding morals and ethics," was "completely honest and trustworthy," and was a "man of honor."

DISCUSSION

I

Admission of Propensity Evidence

Defendant contends the trial court abused its discretion in admitting evidence of his prior acts of child molestation. He

contends the conduct involved was not sufficiently similar to the charged offenses to overcome the prejudice. He notes his previous victims were prepubescent boys of five to nine, while Doe was 13 years old.

A. *The Law*

As a general rule, evidence of a person's character or character trait is inadmissible when offered by the opposing party to prove the defendant's conduct on a specified occasion unless it involves commission of a crime, civil wrong or other act and is relevant to prove some fact (e.g., motive, intent, plan, identity) other than a disposition to commit such an act. (Evid. Code, § 1101, subds. (a), (b)). There is an exception for the use of propensity evidence in sex offense cases. "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." (Evid. Code, § 1108, subd. (a).) As our Supreme Court has explained, "evidence of a defendant's other sex offenses constitutes relevant circumstantial evidence that he committed the charged sex offenses." (*People v. Falsetta* (1999) 21 Cal.4th 903, 920 (*Falsetta*).)

"The charged and uncharged crimes need not be sufficiently similar that evidence of the latter would be admissible under Evidence Code section 1101, otherwise Evidence Code section 1108 would serve no purpose. It is enough the charged and uncharged offenses are sex offenses as defined in section 1108." (*People*

v. Frazier (2001) 89 Cal.App.4th 30, 40-41, fn. omitted.) Evidence of prior sex offenses has been admitted under section 1108 despite an age difference in the victims. (*People v. Escudero* (2010) 183 Cal.App.4th 302, 311 [evidence of prior sexual assaults against young women admitted to prove propensity to commit lewd and lascivious acts against young girl].)

"Evidence Code section 1108 has a safeguard against the use of uncharged sex offenses in cases where the admission of such evidence could result in a fundamentally unfair trial. Such evidence is still subject to exclusion under Evidence Code section 352. (Evid. Code, § 1108, subd. (a).)" (*People v. Fitch* (1997) 55 Cal.App.4th 172, 183 (*Fitch*).) Evidence Code section 352 provides "a realistic safeguard" for the admission of sex offense evidence to show propensity. (*Falsetta, supra*, 21 Cal.4th 903, 918.)

In *People v. Harris* (1998) 60 Cal.App.4th 727 (*Harris*), this court identified the following factors as relevant to the proper balance of prejudice and probative value in connection with prior uncharged sex offenses: (1) the inflammatory nature of the prior offense evidence; (2) the probability that admission of the evidence will confuse the jury; (3) the remoteness of the prior offense; (4) the consumption of time necessitated by introduction of the evidence, and (5) the probative value of the evidence. (*Harris, supra*, 60 Cal.App.4th at pp. 737-740.)

B. Analysis

Considering the *Harris* factors, we find no abuse of discretion in admitting evidence of defendant's prior sex offenses. The prior offenses were no more inflammatory than the current charges; indeed, the lewd acts were the same. Defendant makes no argument that the prior bad acts evidence confused the jury or consumed too much time and nothing in the record would support such an argument. The propensity evidence had probative value as defendant denied the abuse and claimed Doe was a liar. "Evidence of a prior sexual offense is indisputably relevant in a prosecution for another sexual offense. 'In the determination of probabilities of guilt, evidence of character is relevant. [Citations.]' [Citation.] Indeed, the rationale for excluding such evidence is not that it lacks probative value, but that it is too relevant." (*Fitch, supra*, 55 Cal.App.4th 172, 179.)

The only *Harris* factor favoring exclusion is remoteness. The prior offenses were remote, occurring in or before 1991. "In theory, a substantial gap between the prior offenses and the charged offenses means that it is less likely that the defendant had the propensity to commit the charged offenses. However, . . . significant similarities between the prior and the charged offenses may 'balance[] out the remoteness.' [Citation.] Put differently, if the prior offenses are very similar in nature to the charged offenses, the prior offenses have greater probative value in proving propensity to commit the charged offenses." (*People v. Branch* (2001) 91 Cal.App.4th 274, 285.)

Defendant focuses on the differences between the prior and current offenses--the age difference of the victims and that he had known the families of his prior victims for a long time, but he had just met Doe and his mother. While there may be some differences, the similarities are striking. In all cases, defendant preyed upon a boy whose family trusted defendant. Doe's mother described defendant as grandfatherly and thought he was an angel. Defendant gave his victims gifts and told them not to tell. Defendant told both Doe and S.D. that if they told anyone they would lose contact with their parents. The progression of abuse and the actual conduct in all cases was the same: it began with defendant's touching his victim and directing his victims to touch him, then continued to oral copulation, ultimately leading in some cases to sodomy or anal penetration.

Given the similarities of the charged and uncharged crimes, it was not an abuse of discretion to admit evidence of defendant's prior acts of molestation even though they occurred almost 20 years before. (See *People v. Soto* (1998) 64 Cal.App.4th 966, 977-978, 992 [passage of 20 to 30 years does not automatically render prior incidents prejudicial when uncharged and charged sexual offenses are similar].)

II

New Trial Motion

Defendant next contends it was error to deny his motion for a new trial. His new trial motion argued defendant's priors should have been excluded. Since we have found no error in the

admission of evidence of defendant's prior sexual acts, this contention fails.

III

Sufficiency of the Evidence

Defendant contends there was insufficient evidence to support his convictions. This contention fails for a myriad of reasons and is frivolous.

In making his argument, defendant simply quotes his statement to the court at sentencing, proclaiming his innocence. He provides no citations to authority or argument. "An appellate court is not required to examine undeveloped claims, nor to make arguments for parties." (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106 (*Paterno*).) Our role is to evaluate "legal argument with citation of authorities on the points made." (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

Defendant's opening brief contains a short summary of the People's case, focusing on the evidence of prior acts, and completely devoid of citations to the record. It contains a detailed 16-page recitation of the defense evidence. This is inappropriate and violates fundamental rules of appellate procedure in its complete failure to fairly recite the facts or to set forth all of the material evidence that supports the judgment. (See Cal. Rules of Court, rules 8.204(a)(2) & 8.360(a).) "[A]n attack on the evidence without a fair statement of the evidence is entitled to no consideration when it is apparent that a substantial amount of evidence was

received on behalf of the respondent. [Citation.]” (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.)

Finally, the record, even without the evidence of defendant’s prior acts of molestation, clearly contains sufficient evidence to support the verdict. Doe testified to defendant’s many lewd acts and both boys testified that defendant furnished marijuana. As our Supreme Court has made clear, “unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction.” (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

IV

Romero Motion and Cruel and Unusual Punishment

Defendant contends the trial court erred in denying his motion under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 to strike his five prior serious felonies. He complains he received an unfair trial due to the admission of his priors. He summarily asserts that his sentence of 725 years to life is cruel and unusual.

Again, defendant’s contention is not supported by a single citation to authority. Defendant does not even provide the citation for *Romero*. “[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat

it as [forfeited], and pass it without consideration.

[Citations.]' [Citation.]" (*People v. Stanley, supra*, 10 Cal.4th 764, 793; *People v. Hovarter* (2008) 44 Cal.4th 983, 1029.) We consider defendant's contention forfeited.

Further, defendant has failed to make any showing of an abuse of discretion in the denial of his *Romero* motion. "[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, 'in furtherance of justice' pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Far from being outside the spirit of the three strikes law, defendant is exactly the type of recidivist targeted by the law. Defendant was convicted in 1991 on five counts of child molestation and admitted he molested others for which he was not charged, including his own son. After a significant period in prison and extensive counseling, he resumed the same criminal activity. In declining to strike a defendant's priors, "a trial

court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) That is not the case here.

Defendant's claim of cruel and unusual punishment is too cursory to merit comment, except to say the claim fails.

V

Restitution

Defendant contends the trial court abused its discretion in awarding Doe \$270,000 in noneconomic damages. He contends these damages are speculative because there is no assurance that Doe will continue counseling or any report estimating the emotional damage Doe has suffered or will suffer. Again, defendant cites no authority in support of his argument.

This court has held a restitution order for noneconomic damages will be affirmed as long as it "does not, at first blush, shock the conscience or suggest passion, prejudice or corruption on the part of the trial court." (*People v. Smith* (2011) 198 Cal.App.4th 415, 436 [affirming restitution order for \$750,000 in noneconomic damages for years of sexual abuse].) Defendant makes no argument that the award here shocks the conscience or suggests passion, prejudice or corruption by the court. We will not make an argument for him. (*Paterno, supra*, 74 Cal.App.4th 68 at 106.) We see no error.

DISPOSITION

The judgment is affirmed.

DUARTE, J.

We concur:

BLEASE, Acting P. J.

HULL, J.